# PUNCAK NIAGA CONSTRUCTION SDN BHD v. MERSING CONSTRUCTION & ENGINEERING SDN BHD

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
S NANTHA BALAN JCA
AHMAD ZAIDI IBRAHIM JCA
[CIVIL APPEAL NO: W-02(C)(A)-98-01-2021]
8 AUGUST 2022

**Abstract** – *A mere refinement or pruning of a claim under a construction contract, which had been previously submitted to the employer and being then included as part of the payment claim, does not constitute a new or premature claim or in future claim, such that it affects the adjudicator's jurisdiction. An adjudicator has the requisite statutory power to determine the correctness of the amounts which are due and payable after taking into account submissions of the parties in adjudication proceedings.*

***CONSTRUCTION LAW:*** *Adjudication – Decision – Jurisdiction of adjudicator – Claimant commenced adjudication proceedings against employer – Claimant previously submitted impugned items to employer as part of monthly claims but employer never certified items and no payment was made – Discovery of errors in amounts claimed in impugned items – Claimant unilaterally made necessary corrections and presented impugned items as part of payment claim – Whether rectified claim should have been first submitted to employer – Whether payment claim premature – Whether adjudicator acted beyond jurisdiction in considering rectified claims – Construction Industry Payment and Adjudication Act 2012, ss. 4, 5(1), 5(2), 25(m), 25(n), 27*

The appellant, Puncak Niaga Construction Sdn Bhd ('Puncak Niaga'), appointed the respondent, Mersing Construction & Engineering Sdn Bhd ('Mersing') as the subcontractor under a project. Mersing served a payment claim for a sum of RM2,723,839.04 but Puncak Niaga did not serve any payment response. Mersing then issued a notice of adjudication and commenced adjudication proceedings against Puncak Niaga ('adjudication proceedings'). It was not disputed that Mersing had previously submitted the impugned items to Puncak Niaga as part of the monthly claims. However, Puncak Niaga never certified the impugned items and no payment was made in respect of the impugned items. Thereafter, Mersing discovered that there were errors in the amounts claimed in the impugned items. However, they did not re-submit the impugned items. Mersing unilaterally made the necessary corrections and presented the impugned items as part of the payment claim. The adjudicator decided that, *inter alia*, Puncak Niaga was to pay to Mersing the sum of RM2,549,140.57. Aggrieved, in the High

Court, Puncak Niaga claimed that (i) the rectified claim should have been first submitted to them. The rectified claims had by-passed the contractually agreed claim and certification process; (ii) when the sums claimed for the items in the previous progressive claims were wrong, Mersing ought to have first gone back to the contractual claim procedure and rectify its claim in the consequent progressive claim; (iii) Mersing was not an 'unpaid party' for purposes of s. 4 of the Construction Industry Payment and Adjudication Act 2012 ('CIPAA') and under s. 5(1) of the CIPAA, only an 'unpaid party' can serve a payment claim on the 'non-paying party'; (iv) there was no payment dispute between Puncak Niaga and Mersing since a payment dispute was predicated upon a request for payment and a denial of it. In the present case, there was no request for payment as the rectified claims were never made nor presented by Mersing to Puncak Niaga; and (v) Mersing had improperly and prematurely commenced the adjudication proceedings and the adjudicator acted beyond the prescribed parameters laid down in s. 27 of the CIPAA when he considered the rectified claims. The High Court Judge ('HCJ') held that (i) the rectified claims were not 'new claims' as they had been previously submitted to Puncak Niaga as part of the monthly claims; (ii) Mersing merely rectified the errors in the amounts and the adjudicator did not act in excess of his jurisdiction when he considered Mersing's rectified claims. Hence, the present appeals. In Appeal 98, Puncak Niaga appealed against the decision of the HCJ in dismissing Puncak Niaga's application to set aside the decision of the adjudicator made in favour of Mersing. In Appeal 100, Puncak Niaga appealed against decision of the HCJ in allowing the application by Mersing and granting an order to enforce the adjudication decision.

**Held (dismissing appeals):**
**Per S Nantha Balan JCA delivering the judgment of the court:**

**(1)** The payment claim that was submitted by Mersing was not premature and came within s. 5(2) of the CIPAA as it was in respect of claims which were due under a construction contract. The rectified claims were part of the payment claim and they were, therefore, within the jurisdiction of the adjudicator. The adjudicator's decision relating to the particular claim did not go to the jurisdiction of the adjudicator but was one which concerned the merits of Mersing's claim. This involved the exercise of power by the adjudicator under s. 25(m) and (n) of the CIPAA by which the adjudicator may review or revise any certificate to be issued or to decide or declare on any matter notwithstanding no certificate had been issued. Mersing's progress claim and the interim payment certificates were not final nor conclusive. As such, any error in the progress claims was capable of being rectified by Mersing before the completion of works under the project. The certification process was not at an end and only attained finality when the final certificate was issued. (paras 49-51)

**(2)** These were interim claims. The amount could not always be a wholly exact exercise as at that stage, there would be an element of assessment of judgment and with that, the errors would be subject to adjustment and verification. Here, Mersing made the necessary adjustments and rectified the impugned items and presented them as part of the payment claim. If, in the ordinary course, the monthly claims which had been submitted by Mersing had been verified and certified by Puncak Niaga, then errors may have been picked up by Puncak Niaga but that did not happen. The employer's failure or refusal to certify the claim did not take the matter out of the ambit of the CIPAA. Hence, despite Puncak Niaga's non-certification of Mersing's monthly claims, the adjudicator was nevertheless statutorily empowered to adjudicate upon the items which made up the payment claim. (paras 52-54)

**(3)** There was no merit in the argument that since Mersing had by-passed the claims submission and verification, there was no amount that was due and Mersing had no cause of action *vis-a-vis* the impugned items. Given the circumstances of non-certification and non-payment by Puncak Niaga, the full details of claim had been stipulated in the payment claim, it was clear that Mersing was an 'unpaid party' and Puncak Niaga was a 'non-paying party' under the CIPAA, entitling Mersing to lodge a payment claim under the CIPAA *albeit* part of the rectified claim. It was quite obvious that the rectified claims related to work done. Thus, when the rectified claim was made as part of the payment claim, they were not new claims but a scaled down version of an earlier claim which contained erroneous figures. The rectified claims were merely a 'refinement' of the previously submitted monthly claims. It was valid for purposes of adjudication proceedings. (paras 55-57)

**Case(s) referred to:**

*Amec Civil Engineering Ltd v. Secretary of State for Transport [2005] BLR* ***(refd)***
*Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd [2015] 8 CLJ 728 HC* ***(refd)***
*Cantillon Ltd v. Urvasco Ltd [2008] EWHC 282 TCC* ***(refd)***
*Collins (Contractors) Ltd v Baltic Quay Management (1994) Ltd [2004] EWCA (Civ) 1757* ***(refd)***
*OSC Building Services Ltd v. Interior Dimensions Contracts Ltd [2009] EWHC 248* ***(refd)***
*Puncak Niaga Construction Sdn Bhd v. Mersing Construction & Engineering Sdn Bhd And Other Cases [2021] MLJU 1824* ***(refd)***
*Syarikat Bina Darul Aman Bhd & Anor v. Government Of Malaysia [2018] 4 CLJ 248 HC* ***(refd)***
*Tidalmarine Engineering Sdn Bhd v. Conlay Construction Sdn Bhd & Another Case [2018] 2 CLJ 376 HC* ***(refd)***
*Usima Sdn Bhd v. Lee Hor Fong [2017] 9 CLJ 646 HC* ***(refd)***
*View Esteem Sdn Bhd v. Bina Puri Holdings Bhd [2019] 5 CLJ 479 FC* ***(refd)***
*William Verry (Glazing Systems) Ltd v. Furlong Homes Ltd [2005] EWHC 138* ***(refd)***
*Witney Town Council v. Beam Construction (Cheltenham) Ltd [2011] EWHC 2332* ***(refd)***

**Legislation referred to:**
Construction Industry Payment and Adjudication Act 2012, ss. 4, 5(1), (2)(a), (b), 6, 9, 10, 15(d), 25(m), (n), 27(1)

*For the appellant - Tan Tiam Poh; M/s Belden*
*For the respondent - Alvin Lai Kok Wing & Pang Kwong Hang; M/s Justin Voon Chooi & Wing*

*[Editor's note: Appeal from High Court, Kuala Lumpur; Originating Summons No. WA-24C-181-08-2020 (affirmed).]*

*Reported by Lina E*

## JUDGMENT

### S Nantha Balan JCA:

### The Issue

**[1]** In Appeal No. W-02(C)(A)-98-01-2021 ("Appeal 98"), Puncak Niaga Construction Sdn Bhd ("Puncak Niaga") is appealing against the decision of the learned judge ("judge") dated 24 December 2020 dismissing Puncak Niaga's application under s. 15(d) of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") to set aside the decision of the learned adjudicator ("adjudicator") dated 4 August 2020 made in favour of Mersing Construction & Engineering Sdn Bhd ("Mersing") (Adjudication Ref No. AIAC/D/ADJ-3070-2020) ("adjudication decision") *via* Originating Summons No. WA-24C-181-08-2020 ("OS 181"). The application to set aside the adjudication decision was predicated on the grounds that the adjudicator had exceeded his jurisdiction.

**[2]** In this case, Mersing's payment claims under CIPAA consisted of *inter alia*, interim claims which had been previously submitted to Puncak Niaga as per the terms and conditions of the construction contract between Mersing and Puncak Niaga for certification and payment. But the said interim claims were not certified and not paid by Puncak Niaga. Mersing then discovered that there were errors in the interim claims. They unilaterally rectified the amounts stated in the interim claims without re-submitting them to Puncak Niaga for verification/certification as per the terms and conditions of the underlying construction contract.

**[3]** Puncak Niaga contends that Mersing cannot by-pass the claims verification/certification process as per the terms and conditions of the construction contract and pursue these claims as part of the payment claim under CIPAA. Puncak Niaga contends that since Mersing had by-passed the claims verification/certification process as per the terms and conditions of the construction contract, these claims are "premature" and are therefore not due. As such, Mersing is not an "unpaid party" and Puncak Niaga is not a "non-paying party" as defined in s. 4 of the CIPAA.

**[4]** There is another appeal before us, namely, Civil Appeal No. W-02(C)(A)-100-01-2021 ("Appeal 100") by which Puncak Niaga is appealing against the decision of the High Court dated 24 December 2020 in Originating Summons No. WA-24C-182-08-2020 ("OS 182") in allowing the application by Mersing and granting an order to enforce the adjudication decision. It follows that if Appeal 98 is dismissed, then Appeal 100 shall likewise be dismissed, and *vice-versa*.

**[5]** Based on the adjudication claim, the adjudicator decided that:

(i) Puncak Niaga is to pay to Mersing:

(a) the sum of RM2,549,140.57 ("adjudication amount"); and

(b) the cost of the adjudication proceeding comprising an amount of RM19,205.73 for the adjudicator's fee and expenses, Asian International Arbitration Centre's ("AIAC") administrative fee and sales and service tax and RM10,000 being Mersing's cost of preparation for the adjudication; and

(ii) the adjudication amount and the cost of the adjudication proceeding ("adjudicated sum") shall be paid by Puncak Niaga to Mersing on or before 18 August 2020.

**[6]** The judgment of the High Court pertaining to the judge's decision to dismiss OS 181 and in allowing OS 182 is reported as *Puncak Niaga Construction Sdn Bhd v. Mersing Construction & Engineering Sdn Bhd And Other Cases* [2021] MLJU 1824; [2022] 1 AMR 249; [2021] AMEJ 1830 (HC).

**[7]** On 8 August 2022, we dismissed Appeal 98 with costs of RM20,000. Consequently, we also dismissed Appeal 100. We made no order as to costs in respect of Appeal 100. These are our reasons for dismissing Appeal 98. For convenience, we shall refer to the appellant and respondent in Appeal 98 as "Puncak Niaga" and "Mersing" respectively.

**The Facts**

**[8]** Pursuant to a letter of award dated 30 August 2016 ("LOA"), Puncak Niaga appointed Mersing as a sub-contractor under a project known as "Pakej D44 – Pembinaan Rangkaian Paip Pembetungan di Bunus, Kuala Lumpur" ("the Project") for an original contract sum of RM74,691,666.34 and which was adjusted to RM75,017,396.34 through a certificate of variation of works no. 1. It is common ground that the LOA constitutes a "construction contract" for purposes of s. 4 of CIPAA.

**Terms Of The LOA**

**[9]** The contractual terms relating to submission of claims for certification and payment per the LOA are as follows:

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8.1 The Sub-Contractor shall submit to the Main Contractor its claim for Works done on a monthly basis (on or before 25th of each calendar month). The claim must include a detailed breakdown of the particulars of the Sub-Contractor's claim and supported by the relevant and appropriate invoices, documentation, *etc*. Any item of claim lacking in particulars can be rejected by the Main Contractor.

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8.2 The P.D. or his authorised representative shall verify the Sub-Contractor's claim and certify if the Sub-Contract Works have been properly executed by the Sub Contractor within 14 working days from the complete submission of the Sub Contractor progress claim. The Certification by the P.D. or his authorised representative

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shall be based on and upon the valuation and measurement of the Sub-Contract Works by the Employer *ie,* Jabatan Perkhidmatan Pembetungan (PP).

8.3 All progress payments shall be subject to the provisions of Clause 9.0 below.

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8.4 Payment shall be made to the Sub-Contractor within 30 days from Main Contractor's certification of the Sub-Contractor's claims.

8.5 To facilitate cashflow of the Sub-Contractor and upon request by the Sub Contractor, the Main Contractor may, at its absolute discretion, consider and allow the Sub-Contractor to submit

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fortnightly progress claim and the Main Contractor will verify and certify the Sub-Contractor's claims within seven (7) working days from the complete submission of the Sub-Contractor's claims and make payment within two (2) weeks after the said certification. For avoidance of doubt, in the event Main Contractor rejects the Sub-Contractor's submission of fortnightly progress claims, this

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decision shall not be held against the Main Contractor under this Sub-Contract.

## CIPAA Provisions

**[10]** The following provisions of CIPAA are relevant for the present

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purposes.

**Section 4. Interpretation**

**"non-paying party"** means a party against whom a payment claim is made pursuant to a construction contract;

**"payment"** means a payment for work done or services rendered under

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the express terms of a construction contract;

**"unpaid party"** means a party who claims payment of a sum which has not been paid in whole or in part under a construction contract;

**Section 5. Payment claim**

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(1) An **unpaid party** may serve a **payment claim** on a **non-paying party** for payment pursuant to a construction contract.

(2) The payment claim shall be in writing and shall include:

(a) the amount claimed and due date for payment of the amount claimed;

(b) details to identify the cause of action including the provision in the construction contract to which the payment relates;

(c) description of the work or services to which the payment relates; and

(d) a statement that it is made under this Act.

**Section 6. Payment response**

(1) A non-paying party who admits to the payment claim served on him shall serve a payment response on the unpaid party together with the whole amount claimed or any amount as admitted by him.

(2) A non-paying party who disputes the amount claimed in the payment claim, either wholly or partly, shall serve a payment response in writing on the unpaid party stating the amount disputed and the reason for the dispute.

(3) A payment response issued under subsection (1) or (2) shall be served on the unpaid party within ten working days of the receipt of the payment claim.

(4) A non-paying party who fails to respond to a payment claim in the manner provided under this section is deemed to have disputed the entire payment claim.

**Section 15. Improperly procured adjudication decision**

An aggrieved party may apply to the High Court to set aside an adjudication decision on one or more of the following grounds:

(a) the adjudication decision was improperly procured through fraud or bribery;

(b) there has been a denial of natural justice;

(c) the adjudicator has not acted independently or impartially; or

(d) **the adjudicator has acted in excess of his jurisdiction**.

**Section 25. Powers of the adjudicator**

The adjudicator shall have the powers to:

(a) establish the procedures in conducting the adjudication proceedings including limiting the submission of documents by the parties;

(b) order the discovery and production of documents;

(c) set deadlines for the production of documents;

(d) draw on his own knowledge and expertise;

(e) appoint independent experts to inquire and report on specific matters with the consent of the parties;

(f) call for meetings with the parties;

(g) conduct any hearing and limiting the hearing time;

(h) carry out inspection of the site, work, material or goods relating to the dispute including opening up any work done;

(i) inquisitorially take the initiative to ascertain the facts and the law required for the decision;

(j) issue any direction as may be necessary or expedient;

(k) order interrogatories to be answered;

(l) order that any evidence be given on oath;

(m) review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute;

(n) decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter;

(o) award financing costs and interest; and

(p) extend any time limit imposed on the parties under this Act as reasonably required.

**Section 27. Jurisdiction of adjudicator**

(1) Subject to subsection (2), **the adjudicator's jurisdiction in relation to any dispute is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6**.

(2) The parties to adjudication may at any time by agreement in writing extend the jurisdiction of the adjudicator to decide on any other matter not referred to the adjudicator pursuant to sections 5 and 6.

(3) Notwithstanding a jurisdictional challenge, the adjudicator may in his discretion proceed and complete the adjudication proceedings without prejudice to the rights of any party to apply to set aside the adjudication decision under section 15 or to oppose the application to enforce the adjudication decision under subsection 28(1).

(emphasis added)

## Mersing's Payment Claim

**[11]** Mersing served a payment claim dated 21 January 2020 for a sum of RM2,723,839.04 (excluding interest) ("the payment claim") per s. 5 of the CIPAA. Puncak Niaga did not serve any payment response. The brief details of the payment claim (consisting of 26 claim items) are as stated in the table at pp. 3 to 8 attached to Mersing's letter dated 21 January 2020.

**[12]** The payment claim was predicated on the following complaints:

(a) Puncak Niaga failed to make payment for work done and certified in IPC No. 35, and thereby contravening Section 8.4 of the Letter of Award which requires Puncak Niaga to make payment within 30 days of their certification of Mersing claim;

(b) Puncak Niaga breached Section 8.4 of the LOA by paying beyond the due date on some of the past interim payment certificates;

(c) Puncak Niaga failed to issue IPC Nos. 36, 37, 38, 39 and 40, corresponding to Mersing's monthly interim payment claims Nos. 38, 39, 40, 41 and 42 submitted on 25 August, September, October, November and December 2019 respectively;

(d) According to Mersing, Puncak Niaga's non-certification is a breach of Section 8.2 of the LOA which requires them to certify Mersing's claim within 14 days of their interim monthly submissions.

**Mersing's Notice Of Adjudication**

**[13]** Mersing then issued a notice of adjudication on 12 February 2020 pursuant to s. 9 of the CIPAA and commenced adjudication proceedings against Puncak Niaga ("the adjudication proceedings").

**[14]** Mersing's claim included 26 claim items, for works related to pipe jacking, jacking in the rock, pit, rock excavation, manhole construction, mill and pave, relocation of TNB cable, CCTV inspections, varied works (under certificate of variation of works no. 1) and sewer connection. I turn now to the problem at hand. They relate to five out of the 26 items under the payment claim.

**The Problem**

**[15]** The problem here is confined to items 12, 13, 14, 20 and 21 ("the impugned items") of the payment claim. There is no dispute that Mersing had previously submitted the impugned items to Puncak Niaga as part of the monthly claims. But Puncak Niaga never certified the impugned items. And no payment was made in respect of the impugned items.

**[16]** Thereafter, Mersing discovered that there were errors in the amounts claimed in the impugned items. But they did not re-submit the impugned items per clause 8.1 of the LOA. At any rate, it was necessary for the amounts in the impugned items to be rectified because of the errors in the amounts which had been previously submitted by Mersing as part of the monthly claims. Mersing unilaterally made the necessary corrections and presented the impugned items as part of the payment claim. The erroneous amounts and the rectified amounts were properly identified in the payment claim. The value of the impugned items is RM93,577.70. They shall be referred to either as "the impugned items" or "the rectified claims".

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## Puncak Niaga's Adjudication Response

**[17]** In their adjudication response dated 3 June 2020 (per s. 10 of the CIPAA), Puncak Niaga took the following position in regard to the rectified claims;

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Rectification of Sums Claimed in Progress Claim in payment claim

41. Further to the above, the claimant had also acknowledged in both its payment claim and adjudication claim that some of the sums it is pursuing in this adjudication are in fact sums that are arising from mistakes in the previous Progress Claims submitted by the claimant and only corrected In the payment claim. They relate to the following items of claim:

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| Claimed Item in Adjudication | | Claimed Sum in Adjudication (RM) | Remarks made by Respondent |
|---|---|---|---|
| a. Claim item No. 12 | Pit at MH3-3B-1 | 17,476.00 | Mistake in IPA 30, rectified in this payment claim |
| b. Claim item No. 13 | Rock excavation at Pit at MH3-8D | 65,514.90 | Mistake in IPA 38, rectified in this payment claim |
| c. Claim item No. 14 | Manhole Construction for MH3-49 | 4,918.80 | Mistake in IPA 39, rectified in this payment claim |
| d. Claim item No. 20 | CCTV Inspections at MH3-37D to MH3-38D | 2,835.00 | Mistake in IPA 29, rectified in this payment claim |
| e. Claim item No. 21 | CCTV Inspections at MH3-38D to MH3-39D | 2,833.00 | Mistake in IPA 29, rectified in this payment claim |
| Total | | 93,577.70 | |

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[42] With regards to the above, it is clear by the claimant's own admission that the rectification to the claims are only made in the payment claim itself. Therefore, prior to the claimant's submission of its payment claim, the claimant had never submitted the corrected claims to the respondent for certification and payment at any material point in time.

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[43] Under the circumstances, the claimant cannot be said to be an unpaid party within the definition of s. 4 of the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") in respect of the abovementioned claims totalling the sum of RM93,577.70.

[44] Therefore, these claims ought to be dismissed by the learned adjudicator in any event as they are brought prematurely to adjudication.

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**Puncak Niaga's Objection**

**[18]** The gravamen of Puncak Niaga's objection *vis-a-vis* the adjudicator's jurisdiction is that the impugned items consisted of claim amounts which Mersing had unilaterally "rectified" without any prior reference to Puncak Niaga. Essentially, Puncak Niaga's complaint is that the adjudicator exceeded his jurisdiction in adjudicating on the rectified claims. Puncak Niaga contends that the rectified claim should have been first submitted to them per cl. 8.1 of the LOA.

**[19]** Puncak Niaga's complaint is that the rectified claims were never presented to Puncak Niaga for certification and payment at any point in time prior to Mersing's issuance of the payment claim and was only corrected or rectified *via* the payment claim, thus by passing the said contractually agreed claim and certification process.

**[20]** Puncak Niaga contended that since Mersing had admitted that the rectified claim was only made for the first time in the adjudication proceedings therefore the rectified claim is one which did not adhere to the contractually agreed claim and certification process per the LOA.

**[21]** Further, Puncak Niaga contends that when the claimed sum for the respective items in the previous progressive claims are wrong, it necessarily follows that Mersing cannot assert that they are due under the previous progressive claims when they are clearly superseded by the subsequent rectification or correction by Mersing. According to Puncak Niaga, when the sums claimed for the items in the previous progressive claims were wrong, Mersing ought to have first gone back to the contractual claim procedure (cl. 8.1 of the LOA) and rectify its claim in the consequent progressive claim.

**[22]** Thus, according to Puncak Niaga, without doing so, Mersing cannot now make a positive assertion in the payment claim that the sums claimed for the said items were due premised on a calculation which runs from the date of the respective progress claims (which has since been knowingly admitted to be wrong by Mersing).

**[23]** It was argued that Puncak Niaga's obligation to make payment for the said rectified claim under cl. 8.4 of the LOA did not arise and consequently, the due date for such payment did not crystallise nor lapse. Hence, no cause of action accrues in respect of the rectified claim which would entitle Mersing to initiate the adjudication proceedings by filing the payment claim.

**[24]** Puncak Niaga contended that before any due date for payment arises, there must first be an obligation by Puncak Niaga to make such payment. As such, for Mersing to be entitled to such payment for its work done, Mersing needs to submit its claim (together with a detailed breakdown of the

particulars and documentation) to Puncak Niaga for verification. This is in line with the contractually agreed claim and certification process under cl. 8 of the LOA. And if Mersing fails to comply with cl. 8 of the LOA, then Puncak Niaga has the contractual right to reject the claims.

**[25]** Consequently, Puncak Niaga maintains that Mersing is not an "unpaid party" for purposes of s. 4 of the CIPAA which prescribes that it has to be a "party who claims payment of a sum which has not been paid in whole or in part under a construction contract". And under s. 5(1) of the CIPAA, only an "unpaid party" can serve a payment claim on the "non-paying party". According to Puncak Niaga, Mersing is not an "unpaid party" *vis-a-vis* the rectified claims.

**[26]** In the circumstances, Puncak Niaga contends that there is no payment dispute between Puncak Niaga and Mersing since a payment dispute is predicated upon a request for payment and a denial of it. In the present case, there is no request for payment as the rectified claims were never made nor presented by Mersing to Puncak Niaga.

**[27]** As such, a payment dispute did not crystallise which would entitle Mersing to commence the adjudication proceedings. Consequently, Puncak Niaga maintained that Mersing had improperly and prematurely commenced the adjudication proceedings, by way of an invalid payment claim, which consisted of the rectified claims. Thus, Puncak Niaga took the position that the adjudicator acted beyond the prescribed parameters laid down in s. 27 of the CIPAA when he considered the rectified claims. This, according to Puncak Niaga, constitutes an excess of jurisdiction within the meaning of s. 15(d) of the CIPAA.

**Mersing's Response**

**[28]** It was submitted on behalf of Mersing that adjudicator's jurisdiction is derived from matters referred to adjudication by the parties through the payment claim (s. 5 of the CIPAA) and the payment response (s. 6 of the CIPAA). Therefore, on the face of the facts herein, the adjudicator did in fact have the necessary jurisdiction to adjudicate upon claim including the impugned items which had been stated in the payment claim. The impugned items had in substance been submitted by Mersing as part of the previous interim progress claims to be certified by Puncak Niaga.

**[29]** In essence, claim items No. 12, 13, 14, 20 and 21 are related to the following interim progress claims which had been previously submitted by Mersing to Puncak Niaga. It was submitted that based on the payment claim, it can be clearly seen that what is sought to be rectified in the payment claim is to adjust and reduce the claim amounts in the progress claims submitted by Mersing previously as can be summarised as follows:

(i) item No. 12: The amount claimed in Interim Claim No. 30 has been reduced from RM42,320 to RM17,476;

(ii) item No. 13: The amount claimed in Interim Claim No. 38 has been reduced from RM109,761.30 to RM65,514.90;

(iii) item No. 14: The amount claimed in Interim Claim No. 39 has been reduced from RM43,042 to RM30,744;

(iv) item No. 20: The amount claimed in Interim Claim No. 29 has been reduced from RM2,910 to RM2,835; and

(v) item No. 21: The amount claimed in Interim Claim No. 29 has been reduced from RM2,923 to RM2,883.

**[30]** The rectified/adjusted claim amounts formed parts of the progress claim previously submitted by Mersing to Puncak Niaga as the actual quantity/value of the work had been adjusted and reduced and are not completely new claims. Further, since the "rectified claims" or "amount claimed" are for a lower sum compared to the sum claimed through the progress claims, it was submitted that Puncak Niaga are not prejudiced in any way.

**[31]** The adjudicator ruled that it is acceptable for Mersing to have the errors rectified in the payment claim and the fact that errors were made in the progress claims did not preclude Mersing from making a claim under CIPAA nor did it disqualify Mersing as an unpaid party within the definition of s. 4 of the CIPAA.

**[32]** The impugned items were due for payment when the payment claim was served on 21 January 2020. Counsel focussed on the words "unpaid party" and "non-paying party" as defined in s. 4 of the CIPAA. And "unpaid party" means a party who claims payment of a sum which has not been paid in whole or in part under a "construction contract". A "non-paying party" means a party against whom a payment claim is made pursuant to a construction contract".

**[33]** The word "payment" is defined under s. 4 of the CIPAA as "a payment for work done or services rendered under the express terms of a construction contract". There is no dispute that Mersing did undertake work for the benefit of Puncak Niaga pursuant to a construction contract (*ie*, the LOA).

**[34]** Therefore, it was submitted that Mersing is an "unpaid party" as defined under s. 4 of the CIPAA, and Puncak Niaga is a "non-paying party" who was served with a valid payment claim. In the present case, the payment claim came within the requirements of ss. 5(1) and (2) of the CIPAA as the cause of action has been identified by Mersing in the payment claim including the "amount claimed" and due date for payment of the amount claimed. Therefore, the payment claim is valid and this renders Mersing to be an "unpaid party" under CIPAA.

**[35]** Counsel made reference to the decision of the High Court in *Tidalmarine Engineering Sdn Bhd v. Conlay Construction Sdn Bhd & Another Case* [2018] 2 CLJ 376 (HC), at p. 392 where Justice Lee Swee Seng (as he then was) said:

> [80] Once a payment claim comes within the requirements of s. 5(2) CIPAA with respect to a construction contract, then the adjudicator would have the jurisdiction to adjudicate the dispute. A claim premised on a statement of final accounts issued by the superintending officer though disputed by the respondent as a non-paying party would be within the jurisdiction of the adjudicator to decide based as it is on the meaning of a "payment claim" being a claim for work done or services rendered under the express terms of a construction contract and further capable of fulfilling the requirements of s. 5(2) CIPAA.

**[36]** Thus, it was submitted for Mersing that the adjudicator has been clothed with the necessary jurisdiction as there exists a valid payment claim in relation to a construction contract under CIPAA. Reference was made to the Federal Court's decision in *View Esteem Sdn Bhd v. Bina Puri Holdings Bhd* [2019] 5 CLJ 479; [2018] 2 MLJ 22 (FC), 41 to 42 where the Federal Court held:

> [53] The significance of the divide between 'jurisdiction' and 'powers' lies in the fact that 'jurisdiction' relates to 'the types of subject matter which the court may deal with' whereas its powers may be exercised only in relation to that jurisdiction ...

**[37]** By s. 27(1) of the CIPAA, the arbitrator's jurisdiction 'is limited to the matter referred to adjudication' pursuant to ss. 5 and 6 of the CIPAA. It refers to the 'identification of the cause of action' in relation to the construction contract as required under s. 5(2)(b) of the CIPAA. In turn, the payment response under s. 6 of the CIPAA is defined and limited by the claim under s. 5 of the CIPAA. Counsel emphasised that s. 27(1) of the CIPAA refers to the subject matter of the claim under s. 5 of the CIPAA, which is the 'cause of action' identified by the claimant by reference to the applicable clause of the construction contract.

**[38]** Thus, if the payment claim relates to progress claim No 28 (as in the present case) the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to progress claim No 28. It was submitted for Mersing that the adjudication decision relating to the rectified claims did not go to the jurisdiction of the adjudicator, but relates only to the merits of Mersing's claim and/or the exercise of the adjudicator's powers under s. 25(m) and/or (n) of the CIPAA *ie*, to review and revise any certificate to be issued, or to decide or declare on any matter notwithstanding that no certificate has been issued.

**[39]** According to counsel for Mersing, both progress claims and interim certificates are neither final nor conclusive, and any error of the sum claimed in the progress claims can be rectified by Mersing at any time before full completion of the works and issuance of the final certificate. In this case, the works under the project have not been fully completed. As rightly pointed out by the adjudicator (at para. 118 of the adjudication decision) the certification process has not been concluded until the final certificate is issued, and progress claims and interim progress claims are interim in nature and the errors in the progress claims submitted by Mersing are subject to review and correction. See: *Usima Sdn Bhd v. Lee Hor Fong* [2017] 9 CLJ 646; [2017] 5 MLJ 273 (HC).

**[40]** Thus, counsel for Mersing argued that the adjudicator clearly has power to "review and revise" under s. 25(m) of the CIPAA to assess the work done by Mersing and Puncak Niaga's objection is really a challenge on the merits of the adjudication decision which was made by the adjudicator within his jurisdiction. In short, there is no excess of jurisdiction by adjudicator.

**[41]** Counsel referred to *Syarikat Bina Darul Aman Bhd & Anor v. Government Of Malaysia* [2018] 4 CLJ 248 (HC) (at p. 259) where the High Court said;

> [48] *The powers under s. 25 are vast powers granted to an adjudicator so that he can decide on a dispute effectively and efficiently. Before he can exercise any of the powers given to him under s. 25, he must first have the jurisdiction to hear the dispute under s. 27. Once he has the jurisdiction, it is then within his powers to be exercised at his discretion, to decide on whether the claimant is entitled to the whole or part of its claims based on the evidence adduced.* There is nothing to state that he can only exercise his powers upon request of the parties either in their payment claim as in this case when there was no prayer for the certificate to be reviewed or revised. For instance his power under s. 25(b) to order the discovery and production of documents need not be premised upon an application by a party but that he may on his own initiative do so consistent with his powers under s. 25(i) to inquisitorially take the initiative to ascertain the facts and the law required for the decision.
>
> (emphasis added)

**[42]** Thus, counsel for Mersing submitted that although Puncak Niaga is relying on s.15(d) of the CIPAA, Puncak Niaga's contentions largely revolve around the actual merits of the case and not on the issue of "jurisdiction" of adjudicator. In this regard, counsel for Mersing argued that the courts should not delve into the merits of the case to review the adjudication decision because an application under s. 15 of the CIPAA is not an appeal, and whether or not adjudicator has erred in his findings is irrelevant and does not amount to a valid and/or sufficient ground to set aside nor stay the adjudication decision. See: *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd* [2015] 8 CLJ 728, 733 (HC).

**[43]** Counsel for Mersing referred to s. 5 of the CIPAA which provides that:

> 5. Payment Claim.
>
> (1) An unpaid party may serve a payment claim on a non-paying party for payment pursuant to a construction contract.
>
> (2) The payment claim shall be in writing and shall include:
>
> (a) the amount claimed and due date for payment of the amount claimed;
>
> (b) details to identify the cause of action including the provision in the construction contract to which the payment relates;
>
> (c) description of the work or services to which the payment relates; and
>
> (d) a statement that it is made under this Act.

**[44]** The only complaint by Puncak Niaga here is that the rectified claim in the payment claim is not "the amount claimed" as provided in s. 5(2)(a) of the CIPAA. Counsel said that there is no definition of the words "amount claimed" in CIPAA. Thus, "the amount claimed" includes any part of the amount already claimed by the claimant /unpaid party from the non-paying party prior to the payment claim being served on the non-paying party. Pursuant to s. 5(1) of the CIPAA, a payment claim can only be served by an "unpaid party" on a "non-paying party". Both "unpaid party" and "non-paying party" have been defined in s. 4 of the CIPAA. Since an "unpaid party" can claim for payment of a sum which has not been paid in whole or in part under a construction contract, it was submitted that the unpaid party is entitled to claim for a part of the amounts claimed in the payment claim or make a partial claim in the payment claim.

**[45]** In this case, Mersing (unpaid party) included the partial sums of the amounts already claimed in the previous progress claim *ie*, claim items No. 12, 13, 14, 20, 21 and 22 into the payment claim. Thus, it was submitted that Mersing as the unpaid party is fully entitled to do so because an unpaid party can freely choose to claim for a full sum or partial sum of the "amount claimed".

**[46]** According to counsel for Mersing there is nothing wrong for Mersing to rectify, refine or reduce the amount claimed in the previous progress claim and merely make a partial claim in the payment claim and logically, even if an unpaid party included the whole amount claimed in the progress claim into the payment claim, the adjudicator would still have the jurisdiction and power to reduce or adjust the amount claimed in the adjudication decision. Thus, the inclusion of rectified amounts in a payment claim in fact does not invalidate the payment claim, as there is no legal requirement in the first place that the issuance of a payment claim must be based on exact amounts

claimed by the unpaid party prior to the issuance of the payment claim. Mersing's position is that an adjustment on the amount claimed should be allowed so long as the claim has been in substance submitted to the non-paying party prior to the issuance of the payment claim.

**High Court**

**[47]** In the High Court, the judge agreed with Mersing's contention and concluded that the rectified claims are not "new claims". The judge found that the rectified claims had been previously submitted to Puncak Niaga as part of the monthly claims. Puncak Niaga did not certify the monthly claims with reference to the impugned items. Mersing then discovered that there were errors in the amounts claimed in the impugned items. They then rectified the amounts claimed in the impugned items and submitted them as part of the payment claim.

**[48]** The judge's reasons ([35]-[41]) for dismissing OS181 are as follows:

> [35] I have perused Schedule 2 - Summary of Outstanding Payments and Appendices O, P, Q, W and X, which are the relevant documents corresponding to claim item Nos. 12, 13, 14, 20 and 21, respectively, and I find that these claim items are related to the interim claims which had been previously submitted by MCE to Puncak Niaga, namely:
>
> (a) Claim item No. 12 - interim claim No. 30 submitted on December 31, 2018;
>
> (b) Claim item No. 13 - interim claim No. 38 submitted on August 25, 2019;
>
> (c) Claim item No. 14 - interim claim No. 39 submitted on September 25, 2019; and
>
> (d) Claim item Nos. 20 and 21 - interim claim No. 29 submitted on December 4, 2018.
>
> [36] Further, what is sought to be rectified in the payment claim is to adjust and reduce the amounts claimed in the interim claims previously submitted by MCE to Puncak Niaga whereby for:
>
> (a) Claim item No. 12, the amount claimed in interim claim No. 30 has been reduced from RM42,320 to RM17,476;
>
> (b) Claim item No. 13, the amount claimed in interim claim No. 38 has been reduced from RM109,761.30 to RM65,514.90;
>
> (c) Claim item No. 14, the amount claimed in interim claim No. 39 has been reduced from RM43,042 to RM4,918;
>
> (d) Claim item No. 20, the amount claimed in interim claim No. 29 has been reduced from RM2,910 to RM2,835; and
>
> (e) Claim item No. 21, the amount claimed in interim claim No. 29 has been reduced from RM2,923 to RM2,883.

A [37] In addition, the summary of payment claim which was attached to the payment claim, shows that the five claim items have been due for payment when the payment claim was served on January 21, 2020, specifically on:

(a) February 14, 2019 for claim item No. 12;

B (b) October 9, 2019 for claim item No. 13;

(c) November 9, 2019 for claim item No. 14; and

(d) January 18, 2019 for claim item Nos. 20 and 21.

[38] Based on the affidavit evidence, I am satisfied that the amounts C claimed in claim item Nos. 12, 13, 14, 20 and 21 are not completely new claims but they form part of the interim claims which had previously been submitted by MCE to Puncak Niaga as the value of works completed. It is observed that for claim item No. 14, a sum of RM25,825.20 was certified in IPC No. 32 and paid by Puncak Niaga.

D [39] MCE has merely rectified the errors in the amounts as stated in interim claim Nos. 29, 30, 38 and 39, in the payment claim. The adjudicator has rightly decided that it is acceptable for MCE to have the errors corrected in the payment claim and the fact that errors were made in the progress claims does not preclude MCE from making a claim under the CIPAA. Progress claims and interim certificates are neither final nor E conclusive and the adjudicator has the power to review and revise any certificate issued or to be issued under s. 25(m) of the CIPAA and to decide or declare on any matter notwithstanding that a certificate has not been issued under s. 25(n) of the CIPAA (see *Bina Puri Construction Sdn Bhd v. Hing Nyit Enterprise Sdn Bhd* [2015] 4 AMR 565).

F [40] I am thus satisfied that MCE is an "unpaid party" and Puncak Niaga is a "non-paying party" as defined under s 4 of the CIPAA and that the requirements of subsection 5(1) and (2) of the CIPAA as to what constitutes a payment claim have been fulfilled.

[41] In the upshot, this court accepts the submissions by MCE that the adjudicator did not act in excess of his jurisdiction when he considered G MCE's rectified claims in relation to claim item Nos. 12, 13, 14, 20 and 21 in the adjudication proceedings.

## Our Decision

**[49]** The question here is whether, the adjudicator exceeded his jurisdiction H for having adjudicated on Mersing's payment claim which included the rectified claims. At the outset, we may state that it is our finding that the payment claim that was submitted by Mersing is not premature and comes within s. 5(2) of the CIPAA as it is in respect of claims which are due under a construction contract.

I **[50]** As such, the adjudicator has the requisite jurisdiction to deal with and determine the claim on its merits. The rectified claims were part of the payment claim and there are therefore within the jurisdiction of the adjudicator.

**[51]** Of course, a payment claim which is based on claims which are premature and not due (*in futuro*) are not claims which comply with the definition of payment claim per s. 5 of the CIPAA. But that is not the case here. As the High Court observed in *Syarikat Bina Darul Aman Bhd* (*supra*), "... Once he has the jurisdiction, it is then within his powers to be exercised at his discretion, to decide on whether the claimant is entitled to the whole or part of its claims based on the evidence adduced." Consequently, the adjudicator's decision relating to the particular claim does not go to the jurisdiction of the adjudicator but is one which concerns the merits of Mersing's claim. This involves the exercise of power by the adjudicator under s. 25(m) and (n) of the CIPAA by which the adjudicator may review or revise any certificate to be issued or to decide or declare on any matter notwithstanding no certificate has been issued. Mersing's progress claim and the interim payment certificates are not final nor conclusive. As such, any error in the progress claims is capable of being rectified by Mersing before the completion of works under the project. The certification process is not at an end and attains finality when the final certificate is issued.

**[52]** Therefore, as rightly submitted by Mersing, as these are interim claims, the amount cannot always be a wholly exact exercise as at that stage, there will be an element of assessment of judgment and with that the errors will be subject to adjustment and verification. Here, Mersing made the necessary adjustments and rectified the impugned items and presented it as part of the payment claim. We agree that this does not go to the jurisdiction of the adjudicator.

**[53]** In this regard, if in the ordinary course, the monthly claims which had been submitted by Mersing had been verified and certified by Puncak Niaga per cl. 8.1 of the LOA, then errors may have been picked up by Puncak Niaga. But that did not happen as the monthly claims were just not certified. The employer's failure or refusal to certify the claim does not take the matter out of the ambit of CIPAA. There is no doubt at all that in the adjudication proceedings, the adjudicator has statutory power under s. 25(m) to "review and revise any certificate issued or to be issued pursuant to a construction work contract, decision, instruction, opinion or valuation of the parties or contract administrator relevant to the dispute" and under s. 25(n) to "decide or declare on any matter notwithstanding no certificate has been issued in respect of the matter".

**[54]** Hence, despite Puncak Niaga's non-certification of Mersing's monthly claims, the adjudicator is nevertheless statutorily empowered to adjudicate upon the items which make up the payment claim. It is for the adjudicator to decide whether to allow the whole or any part of the amounts stated in the payment claim.

**[55]** It was contended that on behalf of Puncak Niaga that since Mersing had by-passed the claims submission and verification route *via* cl. 8.1 of the LOA, there was no amount that was due and Mersing had no cause of action *vis-a-vis* the impugned items. There is no merit in this argument. In our view, given the circumstances of non-certification and non-payment by Puncak Niaga, the full details of claim have been stipulated in the payment claim, it is clear that Mersing was "unpaid party" and Puncak Niaga a "non-paying party" under CIPAA, entitling Mersing to lodge a payment claim under CIPAA, *albeit* part of it consisted of the rectified claim.

**[56]** It is quite obvious that the rectified claim relates to work done, for which claims had previously made to Puncak Niaga which were not certified. Thus, when the rectified claim was made as part of the payment claim, they were not new claims but a scaled down version of an earlier claim which contained erroneous figures. Puncak Niaga's objection is that the impugned items consisted of claim amounts which Mersing had unilaterally "rectified" without any prior reference to Puncak Niaga. The "rectification" of the amounts was due to errors in the amounts previously claimed by Mersing in the monthly claims. These value of the five items is RM93,577.70.

**[57]** In our view, the rectified claims were merely a "refinement" of the previously submitted monthly claims. Thus, if it is not a new claim and is merely a refinement of a claim which had previously been submitted to the employer, then it is valid for purposes of adjudication proceedings. See: *William Verry (Glazing Systems) Ltd v. Furlong Homes Ltd* [2005] EWHC 138 (TCC)], and OSC *Building Services Ltd v. Interior Dimensions Contracts Ltd* [2009] EWHC 248 (TCC).

**[58]** In the context of the present appeal it is I think relevant to refer to the decision of the English High Court in *Witney Town Council v. Beam Construction (Cheltenham) Ltd* [2011] EWHC 2332 (TCC), [2011] CILL 3090,139 Con.LR 1, [2011] BLR 707, [2011] TCLR 8 (HC) where Akenhead J said that the refinement of a pre-existing dispute does not take that dispute out of the jurisdiction of the adjudicator. This is how the judge put it:

> 23. In some cases, a referring party might decide to cut out of the reference some of the pre-existing matters in dispute and to confine the referred dispute to something less than the totality of the matters then in dispute. **So long as that exercise does not transform the pre-existing dispute into a different dispute, such a pruning exercise is clearly permissible**.
>
> However, a party cannot unilaterally tag onto the existing range of matters in dispute a further list of matters not yet in dispute and then seek to argue that the resulting "dispute" is substantially the same as the pre-existing dispute.
>
> (emphasis added)

**[59]** In the same case Justice Akenhead made reference to *Cantillon Ltd v. Urvasco Ltd* [2008] EWHC 282 TCC, *Amec Civil Engineering Ltd v. Secretary of State for Transport* [2005] BLR 227 and *Collins (Contractors) Ltd v. Baltic Quay Management (1994) Ltd* [2004] EWCA (Civ) 1757 on "how and when a dispute can arise". Based on these cases, Justice Akenhead drew the following propositions

(a) **Courts** (and indeed adjudicators and arbitrators) **should not adopt an over legalistic analysis of what the dispute between the parties** is.

(b) One does need to determine in broad terms what the disputed claim or assertion (being referred to adjudication or arbitration as the case may be) is.

(c) **One cannot say that the disputed claim or assertion is necessarily defined or limited by the evidence or arguments submitted by either party to each other before the referral to adjudication or arbitration**.

(d) The ambit of the reference to arbitration or adjudication may unavoidably be widened by the nature of the defence or defences put forward by the defending party in adjudication or arbitration.

(emphasis added)

## Conclusion

**[60]** For the reasons stated above, we are impelled to the view that the rectified claims which were part of the payment claim are not new claims. Indeed, Puncak Niaga does not even contend that the rectified claims are new claims. They are plainly and patently part of previous monthly claims which Puncak Niaga chose not to verify and certify. These are in any event, interim claims, and are by definition, "not final". Hence, they are capable of adjustment, refinement and pruning.

**[61]** We agree that a payment claim which consists of a premature claim or a *in futuro* claim is not one which complies with ss. 4 and 5 of the CIPAA. But that is not the case here. The fact that Mersing did not re-submit the rectified claims through the route of cl. 8.1 of the LOA is not an impediment to the impugned items being submitted as part of the payment claim because the claims are in fact, for work done under a construction contract and the claims had already been submitted previously to Puncak Niaga and all that has happened is that these same claims have been "refined" or "pruned" by way of discarding erroneous amounts before being submitted as a payment claim.

**[62]** Indeed, instead of refining or pruning the amounts, Mersing could well have chosen to leave the original amounts pertaining to the impugned items intact and not make any refinement or pruning prior to the submission of the payment claim. What would have then happened is that during the

A adjudication proceedings, Mersing could have dropped or abandoned that part of the impugned items which they concede as being erroneous. If they could do it during the adjudication proceedings, we see no reason why the refinement or pruning cannot be done earlier and be made as part of the payment claim.

B **[63]** Further, the adjudicator had the requisite statutory power to determine the correctness of the amounts which are due and payable after taking into account the adjudication response and submissions of the parties in the adjudication proceedings.

C **[64]** Thus, at first blush, Puncak Niaga's objection appeared to be attractive and worthy of consideration. However, upon further reflection especially in light of the principles enunciated by the cases referred to earlier, we are of the view that a mere refinement or pruning of a claim under a construction contract which had been previously submitted to the employer, and being then included as part of the payment claim, does not constitute a new claim,
D or pre-mature claim, or in future claim, such that it affects the adjudicator's jurisdiction. In the result, we find that Puncak Niaga's objection *vis-a-vis* the rectified claims are highly technical and tactical, to say the least. We find no merits in the stand that was taken by Puncak Niaga.

E **Result**

**[65]** In the result, it is our view that there was no misdirection or error on the part of the judge in dismissing OS 181 and in allowing OS 182. As such, we find no merits and Appeal 98 and Appeal 100 are hereby dismissed. We order Puncak Niaga to pay costs of RM20,000 (subject to allocator) in
F respect of Appeal 98. We make no order as to costs for Appeal 100.

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